

(3)  
No. 89-298

Supreme Court, Ohio  
**FILED**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

CHARLES DOWNING and PAUL VENERONI,  
*Petitioners,*

v.

CITY OF URBANA, EX REL. NEWLIN, DIRECTOR OF LAW,  
*Respondent.*

On Petition for a Writ of Certiorari to the  
Supreme Court of Ohio

**PETITIONERS' REPLY MEMORANDUM**

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In its opposing brief in No. 89-298, the respondent asserts that the United States Court of Appeals for the Sixth Circuit has rejected as "superficial" the position advanced by petitioners under the first question presented. In reality, the Sixth Circuit acknowledged that the argument has "superficial appeal." *Turoso v. Cleveland Municipal Court*, 674 F.2d 486, 493 (6th Cir.), *cert. denied*, 459 U.S. 880 (1982). The only reason the court did not accept the argument was that it determined that the Supreme Court of Ohio had authoritatively construed the Ohio obscenity statute in prior cases to limit the definition of sexual conduct applicable for purposes of the second prong of *Miller* to the specific definition of sexual conduct found in Ohio Rev. Code Ann. § 2901.01(aA) (Page 1974) and the examples of such conduct provided by the *Miller* Court. *See Turoso*, at 493. In the instant case, however, the Supreme Court

of Ohio expressly rejected the construction advanced in *Turoso* in favor of one defining sexual conduct as encompassing a wide range of activities, including the touching of another person for the purpose of sexual arousal or gratification, extreme or bizarre violence, cruelty, or brutality, and mere nudity.

Thus, by no means can the *Turoso* decision be viewed as support for the definition of sexual conduct applied by the Supreme Court of Ohio in this case. While the Supreme Court of Ohio did state in this case that it agreed with the incorporation analysis applied in *Turoso*, it specifically rejected the *Turoso* court's position that the *Miller* examples should be deemed to have been incorporated into the legislation's definition of sexual conduct. (See Petition at 14a, 16a). The court also made it clear that the definition of sexual conduct it was applying was not limited to the specific definition of that phrase found in the ordinance. ( See Petition at 14 ).

The respondent also argues that even if the Supreme Court of Ohio did not apply the proper definition of sexual conduct, the petitioners have suffered no prejudice because the magazines at issue contain "hard core" activity proscribable under *Miller*. Obviously, the respondent has missed the point being addressed in the first question presented, that the Supreme Court of Ohio has construed the ordinance in such a manner as to conflict with *Miller*, thereby making the ordinance unconstitutional as construed.

With respect to the second question presented, the respondent simply identifies certain pages of the magazines at issue that it believes contain proscribable sexual conduct. The respondent's "findings" are irrelevant because they are inconsistent with those of the courts that have reviewed the materials, and because the respondent does not identify the definition of sexual conduct it employed in making its determination. It is interesting to note,

however, that even the respondent can find no example of sexual conduct in Exhibit 3 other than in the advertisements in the back of the magazine.

As pointed out above, the Sixth Circuit has not addressed the question of whether the Ohio obscenity statute is constitutional if it is interpreted as the Urbana ordinance was interpreted by the Supreme Court of Ohio in this case. Thus, the respondent's argument to the contrary on the third question presented lacks merit. The same holds true with respect to the respondent's argument that the petitioners have not been prejudiced because the Urbana ordinance has been construed consistently with First Amendment principles. Not only does this statement ignore the problem with the Supreme Court of Ohio's definition of sexual conduct, but it also ignores the fact that the judicial construction required to save the Urbana ordinance from constitutional infirmity is so tortuous as to threaten First Amendment and due process rights. The petitioners are not arguing for a "better crafted obscenity law," but simply one that does not render the *Miller* guarantees of no practical value to Ohio citizens.

Respectfully submitted,

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